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May 12, 2008

### VIA OVERNIGHT DELIVERY AND EMAIL

Thomas L. Morrison  
Deputy Executive Director  
California Building Standards Commission  
2525 Natomas Park Drive, Suite 130  
Sacramento, CA 95833

[CBSC@dgs.ca.gov](mailto:CBSC@dgs.ca.gov)

Re: PEX and PEX-AL-PEX Potable Water Pipe; March 12, 2008 Notice of Proposed Changes; Opposition to Proposed Amendment of CPC Sections 604.1, 604.11, 604.11.1, 604.11.2, 604.13, 604.13.1, 604.13.2 and Table 6-4

Dear Mr. Morrison:

The following comments are respectfully submitted on behalf of the California State Pipe Trades Council in opposition to the proposed California Plumbing Code ("CPC") amendments that would permit the installation and use of cross-linked polyethylene tubing ("PEX") for potable water piping in buildings under the jurisdictions of the Department of Housing and Community Development ("HCD"), the California Building Standards Commission ("CBSC" or "Commission"), the Office of Statewide Health Planning and Development ("OSHPD") and the Division of the State Architect ("DSA") and in opposition to the proposed CPC amendments that would permit the installation and use of PEX-AL-PEX for potable water piping in buildings under the jurisdiction of the CBSC.

The specific HCD, CBSC, OSHPD and DSA PEX proposals are contained in their proposed amendments to CPC sections 604.1, 604.11, 604.11.1, 604.11.2, and table 6-4 ("proposed PEX amendments"). The specific CBSC PEX-AL-PEX proposals are contained in its proposed amendments to CPC sections 604.13,

2057-018d

604.13.1, 604.13.2 (“proposed PEX-AL-PEX amendments”). The proposed PEX and PEX-AL-PEX amendments have been submitted to the Commission for review and public comment as required under the California Building Standards Law and the Administrative Procedure Act.

These comments are submitted in response to the March 18, 2008 Notice of Proposed Changes to Building Standards of the CBSC.

**I. THE COMMISSION MUST DISAPPROVE OR REQUIRE FURTHER STUDY OF THE PROPOSED PEX AND PEX-AL-PEX AMENDMENTS UNTIL A LEGALLY ADEQUATE EIR IS COMPLETED**

On October 31, 2007, the Commission issued a Notice of Preparation (“NOP”) of an environmental impact report (“EIR”) on the adoption of statewide regulations allowing the use of PEX tubing (“the PEX EIR”). To date, the PEX EIR remains incomplete. A draft PEX EIR was released to the public for review on May 9, 2008, with the public comment period running until June 23, 2008.

Because the PEX EIR has not yet been completed and the draft PEX EIR has just been released, public comment on this action is premature. Until the EIR is completed and certified in compliance with the California Environmental Quality Act (“CEQA”), the Commission must table this proposal pending further study.

**II. PREPARATION OF AN EIR IS REQUIRED PRIOR TO ADOPTION OF THE PROPOSED PEX AND PEX-AL-PEX AMENDMENTS**

An EIR must be prepared, circulated for public comment and certified before the Commission may adopt the proposed PEX and PEX-AL-PEX amendments.

A full legal and factual analysis of the requirement to prepare an EIR prior to the adoption of building standards approving the use of PEX and PEX-AL-PEX is contained in our previously submitted August 1, 2005 “Comments of Coalition for Safe Building Materials in Opposition to The Proposed Amendment of CPC Sections 604.1, 604.1.1, 604.11, 604.11.1, 604.11.2, 604.13, 604.13.1 and 604.13.2 to Allow the Statewide Approval of PEX and PEX-AL-PEX Drinking Water Pipe” (“the 2005 PEX and PEX-AL-PEX Comments”) and its accompanying appendices. Our 2005 PEX and PEX-AL-PEX Comments were resubmitted to the Commission as an

attachment to our October 23, 2006 letter to the Commission opposing the proposed approval of PEX and PEX-AL-PEX potable water pipe in response to the Combined Notice of Proposed Action 2006 Annual Code Adoption Cycle, Tracks 8 & 10.

We hereby reference our previously submitted 2005 PEX and PEX-AL-PEX Comments and accompanying appendices and incorporate these documents into our present comments on the proposed PEX and PEX-AL-PEX amendments. If the CBSC no longer has a copy of these prior comments in their records, please let us know and we will provide the CBSC with an additional copy.

Under CEQA, the proposed regulations approving PEX and PEX-AL-PEX may not be adopted until their potential impacts have been fully disclosed, analyzed and mitigated in an EIR. The EIR is the very heart of CEQA.<sup>1</sup> It acts as an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.”<sup>2</sup> The EIR aids an agency in identifying, analyzing, disclosing, and, to the extent possible, avoiding a project’s significant environmental effects through implementing feasible mitigation measures.<sup>3</sup>

Here, substantial evidence previously submitted to the Commission establishes that the proposed PEX and PEX-AL-PEX amendments may result in reasonably foreseeable indirect physical changes in the environment requiring compliance with CEQA.<sup>4</sup> Moreover, the information that is provided by the previously submitted expert comments and appendices overwhelmingly demonstrates that the approval of PEX and PEX-AL-PEX piping for potable water plumbing systems may result in significant public health and environmental impacts requiring preparation of an EIR. These potential impacts include:

- Contamination of drinking water due to the leaching of chemicals such as methyl tertiary-butyl ether (“MTBE”) and tert-butyl alcohol (“TBA”) in amounts that exceed the state standards for taste, odor and health (industry standards allow for the production of PEX and PEX-AL-PEX pipes that leach as much as 50 ppb of MTBE, while California has set a taste and odor standard of 5 ppb and a health standard of 13 ppb);

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<sup>1</sup> *Dunn-Edwards v. Bay Area Air Quality Management Dist.*, (1992) 9 Cal.App.4th 644, 652.

<sup>2</sup> *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220.

<sup>3</sup> Pub. Resources Code § 21002.1(a); CEQA Guidelines § 15002(a), (f).

<sup>4</sup> *Plastic Pipe and Fittings Association v. California Building Standards Commission* (2004) 124 Cal.App.4th 1390 (holding that CEQA applies to the CBSC’s approval of PEX piping).

- Contamination of drinking water due to the permeation of PEX piping by pesticides, termiticides, benzene, gasoline constituents and other toxic chemicals;
- Premature degradation and rupture of PEX and PEX-AL-PEX pipe due to exposure to numerous commonly encountered materials and environmental conditions, including sunlight, high temperatures, chlorine, petroleum products, firestopping material and asphalt;
- Increased risk of biofilm formation containing dangerous pathogens such as Legionella (copper acts as a biocide, killing these pathogens, while PEX and PEX-AL-PEX promote the growth of these pathogens);
- Increased solid waste disposal impacts since PEX is a thermoset plastic which is virtually impossible to recycle (a report by the City of San Francisco Department of Environment found that PEX was the only plastic that no plastic recycler would accept); and
- Increased risk of fire hazard from toxic smoke and fire spread.

CEQA requires that these impacts be analyzed in an EIR to inform the public and public decision makers of the potential impacts, to consider alternatives to the Project, and to consider mitigation measures to reduce these and other harmful impacts.<sup>5</sup>

### **III. THE PROPOSALS TO APPROVE PEX FAIL TO MEET AT LEAST TWO OF THE NINE-POINT CRITERIA**

Before the Commission may adopt a proposed building standard, it must be satisfied that the proposing agency has adequately justified adoption under the nine-point criteria analysis of Health and Safety Code section 18930. The proposals to approve PEX and PEX-AL-PEX, however, fail to meet at least two of the nine-point criteria. Accordingly, the Commission may not find that these proposed standards are justified under the Section 18930 criteria.

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<sup>5</sup> See *Security Environmental Systems v. South Coast Air Quality Management District* (“*Security Environmental Systems v. SCAQMD*”) (1991) 229 Cal.App.3d 110.

Section 18930 requires findings under the nine-point criteria to be supported by substantial evidence. If the Commission finds a factual finding to be arbitrary or capricious or to lack substantial evidence, it shall return the standard back to the proposing agency for reexamination.<sup>6</sup>

In the case at hand, there is substantial evidence that approving PEX and PEX-AL-PEX, without first preparing a legally adequate EIR, would be contrary to the public interest and would be unreasonable, arbitrary and unfair. Accordingly, the proposed PEX and PEX-AL-PEX amendments lack justification under at least two elements of the nine-point criteria.

**A. Approval of PEX and PEX-AL-PEX Without First Completing a Legally Adequate EIR Would Not Be In the Public Interest**

Approval of PEX and PEX-AL-PEX without first completing and certifying a legally adequate EIR would not meet the “public interest” element of the nine-point criteria. Health and Safety Code section 18930, subdivision (3), requires agencies to determine if the “public interest requires the adoption of the building standards.” In the case at hand, the approval of PEX and PEX-AL-PEX without first completing a legally adequate EIR would directly violate the requirements of CEQA. Such deliberate violation of the law would, in itself, be contrary to the public interest. Approval of PEX and PEX-AL-PEX also would be contrary to the public interest due to the numerous significant environmental and public health and safety impacts associated with these products.

As discussed in detail in the 2005 PEX and PEX-AL-PEX comments, approval of this potable water pipe without first completing and certifying a legally adequate EIR violates the requirements of CEQA. It is well settled that compliance with CEQA is in the public interest.<sup>7</sup> CEQA “protects not only the environment but also informed self-government.”<sup>8</sup> CEQA informs the public and its responsible officials of the environmental consequences of their decisions before they are made, ensuring consideration of alternatives and requiring imposition of reasonable mitigation measures.<sup>9</sup> As a result, the failure to complete and certify a legally adequate EIR

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<sup>6</sup> Health & Saf. Code § 18930, subd. (d) (1).

<sup>7</sup> See *Kane v. Redevelopment Agency of City of Hidden Hills* (1986) 179 Cal.App.3d 899, 905; *People By and Through Dept. of Public Works v. Bosio* (1975) 47 Cal.App.3d 495, 526; see also Pub. Resources Code § 21000.

<sup>8</sup> *Communities for a Better Environment v. Calif. Resources Agency*, *supra*, 103 Cal.App.4th at p. 108.

<sup>9</sup> *Id.*; Pub. Resources Code §§ 21063 & 21100.

prior to approval of the PEX and PEX-AL-PEX amendments would be contrary to the public's interest in ensuring informed self-government and in protecting public health and safety and the environment.

**B. Approval of PEX and PEX-AL-PEX Without First Completing a Legally Adequate EIR Would Be Unreasonable, Arbitrary and Unfair**

Health and Safety Code section 18930, subdivision (4), requires agencies to justify their proposed building standards on the grounds that the proposed standard "is not unreasonable, arbitrary, unfair, or capricious, in whole or in part." In the case at hand, it is manifestly unreasonable, arbitrary and unfair to propose the adoption of building standards in a manner contrary to law. As discussed in detail in the 2005 PEX and PEX-AL-PEX comments, allowing the approval of PEX and PEX-AL-PEX without first completing and certifying a legally adequate EIR is a clear violation of CEQA. Such approval may not be justified under the nine-point criteria.

Furthermore, the proposed approval of PEX and PEX-AL-PEX is unfair and unreasonable due to the substantial evidence of potential significant impacts associated with this expanded approval. Approval of a building material without first requiring full disclosure, evaluation and mitigation of its potential impacts is unfair to the public. Moreover, a proposal by an agency to have a potentially hazardous building material approved without such disclosure, evaluation and mitigation is unreasonable, arbitrary and capricious.

#### **IV. CONCLUSION**

Substantial evidence has been submitted to the Commission demonstrating that approval of the proposed PEX and PEX-AL-PEX amendments may result in significant impacts on public health and the environment. Such impacts include contamination of drinking water due to leaching and permeation, premature degradation and failure, increased risk of Legionella, increased solid waste disposal impacts and increased fire hazards. Full compliance with CEQA is necessary to fully disclose the extent of these potential impacts and to consider alternative pipe materials and mitigation measures.

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The State Pipe Trades Council respectfully requests that the Commission require full compliance with CEQA, including the completion of a legally adequate EIR, prior to adopting the proposed PEX and PEX-AL-PEX amendments. Until PEX and PEX-AL-PEX pipe are meaningfully evaluated in a legally adequate EIR, the PEX amendments proposed by HCD, CBSC, OSHPD and DSA and the PEX-AL-PEX amendments proposed by CBSC must be disapproved or, in the alternative, held for further study.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas A. Enslow", followed by a horizontal line.

Thomas A. Enslow

TAE:cnh

cc: Ted A. Reed  
Executive Director  
California State Pipe Trades Council